MALAYAN UNION REPORTS.

PUBLIC PROSECUTOR v. MIRZA KHAN.

[Orig. Crim. Juris. (Spenser Wilkinson, J.)
November 8, 1946]

Public Order and Safety Proclamation, Sections 2, 3 (1) and 6 —Definition of person in Section 2 of the Public Order and Safety Proclamation excludes members of the Armed Forces and of the Police Force —Whether a member of the Armed Forces or of the Police Force may be liable for abetment or an attempt of the offence of carrying arms under the Penal Code— Whether a member of the Armed Forces or of the Police Force can be made liable for abetting the act of carrying arms by a person who is a member of the Armed Forces or of the Police Force—Definition of "offence" in Section 40 of the Penal Code—Penal Code, Sections 108 and 109.

In this case the accused, a member of the Armed Forces within the meaning of the exception in the definition of "person" in Section 2 of the Public Order and Safety Proclamation, was charged inter alia with having abetted the act of carrying arms committed by a detective in the Police Force, the charge being laid under Section 109 of the Penal Code and Section 3 (1) of the Public Order and Safety Proclamation. A preliminary objection was raised to the charge upon two main grounds viz:

(1) That the abetment of an offence under the Proclamation has been made an offence by Section 6 of the Proclamation and that this provision has impliedly repealed the provisions of the Penal Code relating to abetment so far as these provisions refer to offences under the Penal Code.

(2) That the person abetted in this case being a member of the Police Force and therefore also exempt from the provisions of the Proclamation, the carrying of arms by him was no offence, so that there was no offence which could be abetted and that the accused could not therefore be liable.

Held, (1) that there is nothing in the Proclamation as a whole to indicate any intention to repeal or override any of the existing provisions of the Criminal law and there being no inconsistency between the provisions of the Proclamation and of the Penal Code relating to abetment, there is no reason why the provisions of Section 6 of the Proclamation and the provisions relating to abetment in the Penal Code should not stand side by side.

(2) That a member of the Forces, although not himself liable under Section 6 of the Proclamation, may be liable for abetment or an attempt under the Penal Code.

(3) That as the word "offence" in Section 108 of the Penal Code is defined by Section 40 of the same code to mean only an offence punishable under the Penal Code, Section 108 of the Penal Code is not applicable to offences under the Public Order and Safety Proclamation.

(4) That therefore a member of the Armed Forces or of the Police Force cannot be made liable for abetting the offence of carrying arms by any person who is himself a member of the Armed Forces or of the Police.

CRIMINAL TRIAL.

A. J. Grattan-Bellew (D.P.P.) for the Public Prosecutor.

Khoo Teik Ee for the accused.

Spenser-Wilkinson, J. :—In this case the accused, a member of the Armed Forces within the meaning of the exception in the definition of "person" in Section 2 of Proclamation 50, is charged *inter alia* with having abetted the act of carrying arms committed by a detective in the Police Force. The charge is laid under Section 109 of the Penal Code and Section 3 (1) of the Public Order and Safety Proclamation.

A preliminary objection has been raised to this charge upon two main grounds. The first is that the abetment of an offence under the Proclamation is made an offence by Section 6 of the same Proclamation and that this provision impliedly repeals the provisions of the Penal Code relating to abetment so far as those provisions refer to offences under the Proclamation. It is argued that Section 6, having provided for abetment of offences under the Proclamation, no other provisions can be used; and as this section does not apply to members of the Armed Forces the accused in this case cannot be liable thereunder. The second ground of objection to the charge is that the person abetted in this case being a member of the Police Force and therefore also exempt from the provisions of the Proclamation, the carrying of arms by him was no offence, so that there was no offence which could be abetted and the accused cannot be liable.

Dealing with the first objection, I am of opinion that Section 6 of the Public Order and Safety Proclamation does not effect a repeal of any part of the Penal Code. There does not seem to me to be any inconsistency between the provisions of this Proclamation and the provisions of the Penal Code relating to abetment, and I can see nothing in the Proclamation as a whole to indicate any intention to repeal or override any of the existing provisions of the criminal law. The section in question is more drastic than was the law before the Proclamation was passed and not only deals with attempts and abetment but also makes it punishable for any person having knowledge of an offence to fail to report it. I think the intention was to give special facilities to deal with accessories of all kinds in respect of the special offences dealt with by the Proclamation. It is quite common in the criminal law to find that an act or omission is punishable in different ways under different provisions of the law and I see no reason why the provisions of Section 6 of the Proclamation and the provisions relating to abetment in the Penal Code should not stand side by side.

The result is that a member of the Forces, although not himself liable under Section 6 of the Proclamation, may be liable for abetment or an attempt under the Penal Code. This objection therefore fails.

The second point turns upon the construction of Sections 108, 109 and 40 of the Penal Code. Section 108 reads as follows.—

> A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

It is clear that the act of the accused could not amount to abetting the commission of an offence within the meaning of the first part of this section because the carrying of arms by a detective, who is a member of the Police Force, is not an offence. The next question therefore is whether the case falls within the second branch of Section 108. Was the act of the detective in carrying this arm an "act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor?" Were it not for the provisions of Section 40 of the Penal Code I would be prepared to hold that it was such an act. Illustration (d) to Explanation 3 to Section 108 is an example of an act which would have been an offence but for circumstances peculiar to the person who committed the act, in the same way that a detective who carried arms would be guilty of an offence but for the particular fact that he is a member of the Police Force.

By reason of Section 40 of the Penal Code, however, the expression "offence" in Section 108 denotes only an offence punishable under the Code. And it is only by virtue of Section 108 that the abetment of an act which is not itself punishable can be made punishable under Section 109. The latter section punishes anyone who abets any "offence", which here means an offence against the Penal Code or any other law. Section 108 has the effect of extending the meaning of the expression "abetting an offence" by including in that expression the abetment of acts which are not, but which in certain circumstances would be, offences under the Penal Code itself. It does not extend it to include the abetment of acts which are not offences but which might in certain circumstances be offences against laws other than the Penal Code.

The results which flow from Section 40 giving a different meaning to the word "offence" in Sections 108 and 109 seem at first sight somewhat peculiar. I must assume, however, that the difference is intentional.

The result in my opinion is that a member of the Armed Forces or of the Police Force may be liable for abetting the offence of carrying arms if the person abetted is not a member of the Armed Forces or the Police but cannot be made liable for abetting the act of carrying arms by any person who is a member of the Armed Forces or of the Police.

The charge against the accused in this case under Section 109 of the Penal Code and Section 3 (1) of the Public Order and Safety Proclamation is therefore bad.

Preliminary Objection Upheld.

PUBLIC PROSECUTOR v. YAP TAI (f).

[App. Crim. Juris. (Spenser-Wilkinson, J.)
January 2, 1947]

Land Code, Sections 17, 29, 250 and 251—Land Rules 1930, Rule 40—State land held under temporary occupation licence—Failure to vacate after notice to quit—Unlawful occupation—Reasonable notice of revocation must be given—Interpretation of Statutory Code.

The respondent had been in occupation of an area of State land in Kuala Lumpur for a number of years under Temporary Occupation Licence issued from time to time in accordance with Section 17 of the Land Code and Rule 40 of the Land Rules, 1930. The last licence held by the respondent expired on the 31st December 1945. Renewal of the licence appears to have been recommended on the 8th March 1946, but no further licence was in fact issued. On the 31st May 1946, a notice was served upon the respondent requiring her to vacate the land and demolish the house on it within 80 days of the date of service of the notice. The respondent having failed to leave the land, an information was laid on the 25th October, 1946 by the Collector of Land Revenue to the effect that she had failed to vacate and was still in occupation of the land and praying that she be summoned to appear before the Court on the hearing of the information. The information was heard by the District Judge on the 25th November 1946. The District Judge dismissed the summons on the ground that the occupation of the respondent was not unlawful within the meaning of Section 250 of the Land Code. He based his decision on the view that there is no difference between the case of the respondent and that of a tenant holding over after the expiration of a lease and as the position of such a tenant is recognised by law his occupation cannot be said to be unlawful. The Public Prosecutor appealed against this decision.

Held, (1) that the intention of the Land Code is that the occupation of State land under Section 17 should be temporary and under licence only; that sections 250 and 251 of the Land Code are intended to supply a summary procedure for the ejectment of temporary occupants who hold over; and that the occupation of State land without licence whether because the licence has expired or because it was never acquired is contrary to the provisions of the Code in that it is inconsistent with its provisions, and it is intended to be included within the meaning of the term "unlawful occupation";

(2) that a licensee whose licence is revoked would probably be entitled to reasonable notice of revocation and that the ninety days given in this case was in all the circumstances reasonable.

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